

1 RONALD J. TENPAS
Assistant Attorney General
2 Environment & Natural Resources Division
United States Department of Justice
3 THOMAS P. CARROLL, D.C. Bar No. 388593
Senior Attorney
4 Environmental Enforcement Section
Environment & Natural Resources Division
5 United States Department of Justice
P.O. Box 7611
6 Washington, D.C. 20044
Telephone: (202) 514-4051
7 Fax: (202) 514-2583
Email: [th](#)

8 (Additional Counsel are listed on the next page)
9
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11 IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
12 SACRAMENTO DIVISION

13 **UNITED STATES OF AMERICA, and**

14 **CALIFORNIA DEPARTMENT OF TOXIC**
15 **SUBSTANCES CONTROL,**

16 Plaintiffs,

17 v.

18 **NEWMONT CAPITAL LIMITED, and**
19 **NEWMONT MINING CORPORATION OF**
20 **CANADA LIMITED**

Defendants.

Case No.: 2:08-at-1061

**COMPLAINT FOR
RECOVERY OF RESPONSE
COSTS AND DECLARATORY
RELIEF FOR FUTURE
RESPONSE COSTS
(Comprehensive Environmental
Response, Compensation, and
Liability Act of 1980, 42 U.S.C.
§§ 9601 - 9675)**

1 MCGREGOR W. SCOT

United States Attorney

2 SYLVIA QUAST, State Bar No. 159011

Chief, Defense Litigation Unit

3 United States Attorney's Office

Eastern District of California

4 501 I Street, Suite 10-100

Sacramento, CA 95814

5 (916) 554-2740 (Tel.)

(916) 554-2900 (Fax)

6 S

7 Attorneys for Plaintiff United States of America

8

EDMUND G. BROWN JR.

9 Attorney General of the State of California

MATTHEW J. RODRIGUEZ

10 Chief Assistant Attorney General

KEN ALEX

11 Senior Assistant Attorney General

SALLY MAGNANI KNOX

12 Supervising Deputy Attorney General

KIRK MCINNIS, State Bar No. 130952

13 Deputy Attorney General

1515 Clay Street, 20th Floor

14 P.O. Box 70550

Oakland, CA 94612-0550

15 Telephone: (510) 622-2191

Fax: (510) 622-2270

16 Email: K

17 Attorneys for Plaintiff California Department of Toxic Substances Control

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1 The United States of America, acting at the request of the Administrator of the
2 Environmental Protection Agency (“EPA”), and the California Department of Toxic Substances
3 Control (“DTSC”) (collectively “Plaintiffs”), file this Complaint and allege as follows:

4 STATEMENT OF THE ACTION

5 1. Plaintiffs file this civil action, pursuant to Section 107(a) of the
6 Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42
7 U.S.C. §§ 9607(a), for the recovery of response costs related to releases and threatened releases
8 of hazardous substances from the Lava Cap Mine Superfund Site located in Nevada County,
9 California (“the Site”).

10 2. Plaintiffs further make a claim for declaratory relief, pursuant to Section
11 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), for a declaratory judgment that Plaintiffs are
12 entitled to recover from the named Defendants for future response costs related to releases and
13 threatened releases of hazardous substances from the Site.

14 VENUE AND JURISDICTION

15 3. This Court has jurisdiction over this CERCLA claim pursuant to 28 U.S.C.
16 §§ 1331 and 1345, and Section 113(g) of CERCLA, 42 U.S.C. § 9613(g).

17 4. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and (c), and
18 Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), because the release or threatened release of
19 hazardous substances that gives rise to these claims occurred in this district and because the Site
20 is located in this district.

21 PLAINTIFFS

22 5. Plaintiff United States of America, by the undersigned attorneys, is acting on
23 behalf of the United States Environmental Protection Agency.

24 6. Plaintiff California Department of Toxic Substances Control is a state agency
25 organized and existing under the laws of the State of California. DTSC is the state agency
26 responsible under state law for determining whether there has been a release or threatened
27 release of a hazardous substance into the environment and whether response action is necessary.

DEFENDANTS

7. Defendant Newmont Mining Corporation of Canada Limited (“Newmont Canada”) is a Canadian corporation whose principle place of business is 20 Eglinton Avenue West, Toronto, Ontario, Canada M4R 1K8. Newmont Canada, through its corporate predecessors, owned or operated the Lava Cap Mine at the time of disposal of hazardous substances at the Site.

8. Defendant Newmont Capital Limited (“Newmont Capital”) is a Nevada Corporation whose principle place of business is 1700 Lincoln Street, 28th Floor, Denver, Colorado 80203-4501. Newmont Capital owned or operated the Lava Cap Mine at the time of disposal of hazardous substances at the Site.

CERCLA STATUTORY SCHEME

9. Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), provides that whenever any hazardous substance, pollutant, or contaminant is released into the environment, or there is a substantial threat of such a release into the environment, the President is authorized to act, consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (“NCP”), 40 C.F.R. Part 300, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant or take any other response measure consistent with the NCP that the President deems necessary to protect the public health or welfare or the environment.

10. The President's authority under Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), has been lawfully delegated to the Regional Administrator of Region IX of EPA.

11. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides that certain parties are liable for the United States’ and DTSC’s response costs incurred under CERCLA:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section –

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of

1 hazardous substances owned or possessed by such person, by any other party or entity, at
2 any facility or incineration vessels owned or operated by another party or entity and
containing such hazardous substances, and

3 (4) any person who accepts or accepted any hazardous substances for transport to
4 disposal or treatment facilities, incineration vessels or sites selected by such
person, from which there is a release, or a threatened release which causes the
incurrence of response costs, of a hazardous substance, shall be liable for—

5 (A) all costs of removal or remedial action incurred by the United States
6 Government or a State. . . not inconsistent with the national contingency
plan

7
8 12. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides that interest on
9 response costs incurred by the United States or a state is recoverable.

10 13. Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), provides that in
11 actions for recovery of costs, “the court shall enter a declaratory judgment on liability for
12 response costs or damages that will be binding on any subsequent action or actions to recover
13 further response costs or damages.”

14 GENERAL ALLEGATIONS

15 14. The Lava Cap Mine Superfund Site is situated approximately 5 miles
16 southeast of Nevada City, California and includes portions of Little Clipper Creek drainage,
17 Clipper Creek drainage, Little Greenhorn Creek, Lost Lake and the underlying groundwater.
18 The Lava Cap Mine, which is part of the Site, occupies approximately 30 acres in a rural
19 residential area of the Sierra Nevada foothills. Gold and silver mining activities were initiated at
20 the Lava Cap Mine (formerly known as the Central Mine) in 1861. The Banner Mine, which lies
approximately 1.5 miles north of Lava Cap Mine, began operation in 1860.

21 15. During the initial operating period from approximately 1860 to 1918,
22 intermittent and relatively small-scale mining operations occurred at both mines.

23 16. In 1932, the Lava Cap Gold Mining Corporation (“LCGMC”) acquired both
24 the Lava Cap and Banner Mines along with other mining tracts and operations in the area.
25 LCGMC constructed a floatation plant to process the ore from its newly acquired properties.

26 17. In 1934, mining operations began again at both mines. At approximately the
27 same time, LCGMC connected the two mines by several underground tunnels. Ore from the
28 Banner Mine was transported via these tunnels to the Lava Cap Mine and brought to the surface.

1 The ore was then processed in the Lava Cap mill.

2 18. Between 1934 and 1943, the Lava Cap Mine was one of the largest gold
3 mines operating in California, producing approximately 270,000 ounces of gold and 2.3 million
4 ounces of silver.

5 19. In 1943, the Lava Cap Mine ceased operations pursuant to an Executive
6 Order issued by the War Production Board, which prohibited the production of non-strategic
7 metals during World War II.

8 20. The mining operations resulted in two piles of mining waste at the Site: a
9 waste rock pile and a mill tailings pile. The mill tailings, which are also known as rock flour, are
10 extremely fine-grained materials with high concentrations of arsenic that are easily suspended in
11 water and are susceptible to being carried offsite.

12 21. A log dam was built on the Lava Cap Mine property to hold the mill tailings
13 in place.

14 22. A second dam, known as Lost Lake Dam, was constructed as a mill tailings
15 impoundment, creating Lost Lake. Discharges of arsenic-contaminated water and tailings from
16 the Lava Cap Mine into Little Clipper Creek flowing along the creek to the Lost Lake Dam have
17 been occurring since at least 1934. Even under normal, non-storm conditions, the Lava Cap
18 Mine discharged between 50 and 200 gallons of contaminated water per minute.

19 23. In 1952, New Goldvue Mines Limited ("NGV") acquired all the assets and
20 liabilities of LCGMC. NGV arranged for title to the Lava Cap Mine to be held by its wholly-
21 owned California subsidiary, Keystone Copper Corporation ("Keystone").

22 24. During NGV's and Keystone's ownership and operation of the Site, arsenic-
23 contaminated water and tailings were released from the property into the environment.

24 25. In addition to these ongoing discharges, in 1979, the log dam partially
25 collapsed due to rotting logs and long-term neglect of proper maintenance. This failure resulted
26 in a sudden and significant discharge of tailings into Little Clipper Creek.

27 26. In 1979, the Central Valley Regional Water Quality Control Board ("the
28 Board") and the California Department of Fish and Game investigated this discharge and found

1 that the discharge had resulted in arsenic-contaminated water and tailings entering Little Clipper
2 Creek and flowing downstream.

3 27. Also in 1979, the Board issued a Complaint of Discharge letter, followed by a
4 Cleanup and Abatement Order to Keystone, which held title to the Lava Cap Mine at the time,
5 and to two individual lessors.

6 28. On February 23, 1979, NGV changed its name to Lava Cap Resources
7 Limited. On July 11, 1983, Franco-Nevada Mining Corporation Limited, a Canadian
8 corporation, entered into an agreement to purchase the Lava Cap and Banner Mines, as well as
9 certain rights of exploration. At the time of this purchase and afterward, arsenic-contaminated
10 water and tailings continued to be released from the property into the environment.

11 29. On December 31, 1983, Franco-Nevada Mining Corporation, Inc., a newly
12 formed Nevada corporation affiliated with Franco-Nevada Mining Corporation Limited, received
13 title to the Lava Cap Mine properties from Keystone via a quitclaim deed.

14 30. In December 1986, Newmont Capital, the successor by name change to
15 Franco-Nevada Mining Corporation, Inc., and Newmont Canada, the successor by name change
16 to Franco-Nevada Mining Corporation Limited, jointly abandoned the mine exploration project,
17 and, on December 23, 1986, Newmont Capital conveyed the Lava Cap Mine parcels back to
18 Keystone via a quitclaim deed. From December 31, 1983, to December 1986, arsenic-
19 contaminated water and tailings continued to be released from the property into the environment.

20 31. On or about January 1, 1997, the upper half of the log dam completely
21 collapsed, discharging over 10,000 cubic yards of additional tailings into Little Clipper Creek.

22 32. The discharges spread tailings contaminated with arsenic into Little Clipper
23 Creek and downstream to Clipper Creek and Lost Lake where they have accumulated in the
24 sediment and surrounding soil.

25 33. After this collapse, DTSC, along with staff from the California Department of
26 Fish and Game and the Nevada County Department of Environment Health inspected and tested
27 soil and water at the Lava Cap Mine and down gradient areas. In June 1997, DTSC issued an
28 information sheet warning of potential hazards from contact with sediment at the Site.

1 34. In October 1997, EPA Region IX Emergency Response Section determined
2 that the conditions associated with the tailings release from the Lava Cap Mine met the NCP
3 criteria, 40 C.F.R. Part 300.415(b)(2), for a removal action.

4 35. During 1997 and 1998, EPA conducted a removal action at the Site to address
5 releases of tailings, stabilize the remaining tailings pile, and improve drainage.

6 36. Also, in 1998, EPA evaluated the Site to determine if the potential risks to
7 human health and the environment posed by the Site warranted listing it on the National
8 Priorities List ("NPL"), pursuant to 42 U.S.C. § 9605(a)(8)(B). Based on this evaluation, EPA
9 added the Site to the NPL in January 1999, 64 Fed. Reg. 2942 (Jan. 19, 1999).

10 37. Since the Site has been listed on the NPL, EPA has been conducting its
11 remedial investigation and feasibility studies. In September 2004, EPA issued a Record of
12 Decision, selecting a remedial action for the Mine Area Operable Unit of the Site. EPA
13 continues to work on its remedial investigation and feasibility studies for the remainder of the
14 Site.

15 38. In September 2005, construction of the remedial action for the Mine Area
16 Operable Unit began. The United States' and DTSC's response actions are ongoing.

17 39. Through April 30, 2008, EPA has incurred \$21,365,002.14 in response costs
18 for the Site, and it anticipates that it will continue to incur additional response costs.

19 40. Through March 31, 2008, DTSC has incurred \$717,143.16 in response costs
20 for the Site, and it anticipates that it will continue to incur additional response costs.

21 FIRST CAUSE OF ACTION

22 (Claim for Recovery of Response Costs Pursuant to Section 107(a) of CERCLA)

23 41. Plaintiffs reallege and incorporate by reference the allegations of paragraphs
24 1 through 40 as if set forth here.

25 42. The Lava Cap Mine Superfund Site is a "facility" within the meaning of
26 Section 101(a) of CERCLA, 42 U.S.C. § 9601(a).

27 43. Arsenic is a "hazardous substance" as defined by Section 101(14) of
28 CERCLA, 42 U.S.C. § 9601(14).

1 44. The discharges of arsenic-contaminated water and tailings from Lava Cap
2 Mine are “releases” of hazardous substances into the environment from the facility within the
3 meaning of Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

4 45. Each Defendant is a “person” within the meaning of Section 101(21) of
5 CERCLA, 42 U.S.C. § 9601(21).

6 46. As a result of the releases or threatened releases of hazardous substances
7 from the Site, the United States and DTSC have participated in response actions and incurred
8 response costs, including the costs of oversight and enforcement costs, within the meaning of
9 Section 101(25) of CERCLA, 42 U.S.C. § 9601(25).

10 47. The response actions at the Site and the costs incurred in relation to such
11 response actions were not inconsistent with the relevant provisions of the NCP, 40 C.F.R. Part
12 300.

13 48. Each of the Defendants is liable, jointly and severally, pursuant to Section
14 107(a) of CERCLA, 42 U.S.C. § 9607(a), for all of the United States’ and DTSC’s response
15 costs incurred at or in connection with the Site.

16 SECOND CAUSE OF ACTION

17 (Declaratory Relief)

18 49. Plaintiffs reallege and incorporate by reference the allegations of paragraphs
19 1 through 40 as if fully set forth here.

20 50. Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), provides that “the
21 court shall enter a declaratory judgment on liability for response costs or damages that will be
22 binding on any subsequent action or actions to recover further response costs or damages.”

23 51. The United States’ and DTSC’s response actions at the Site are ongoing, and
24 they expect to incur substantial response costs in the future.

25 52. The United States and DTSC seek a declaratory judgment that the Defendants
26 are liable, without regard to fault, to the United States and DTSC, in any subsequent action for
27 future response costs incurred at the Site by the United States and DTSC.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs United States and California Department of Toxic Substances Control pray for relief as follows:

A. For a judgment that the Defendants are jointly and severally liable to the United States for all response costs incurred by the United States as a result of the release and threatened release of hazardous substances from the Lava Cap Mine Superfund Site, in an amount of at least \$21,365,002.14 plus prejudgment interest;

B. For a judgment that the Defendants are jointly and severally liable to DTSC for all response costs incurred by DTSC as a result of the release and threatened release of hazardous substances from the Lava Cap Mine Superfund Site, in an amount of at least \$717,928.31 plus prejudgment interest;

C. For a declaratory judgment that the Defendants are jointly and severally liable to the United States and DTSC for all future response costs incurred by the United States and DTSC as a result of the release and threatened release of hazardous substances from the Lava Cap Mine Superfund Site;

D. For enforcement costs, including costs of this suit and attorneys fees;

E. And for all other relief the Court deems just and appropriate.

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2 Dated: September 12, 2008

/s/Ronald J. Tenpas
RONALD J. TENPAS
Assistant Attorney General
Environment & Natural Resources Division
United States Department of Justice

5
6 /s/Thomas P. Carroll
THOMAS P. CARROLL
Senior Attorney
Environmental Enforcement Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044
Telephone: (202) 514-4051
Fax: ()
Email: [th](#)

11 MCGREGOR W. SCOTT
12 United States Attorney

13 /s/Sylvia Quast
SYLVIA QUAST
14 Chief, Defense Litigation Unit
United States Attorney's Office
15 Eastern District of California
501 I Street, Suite 10-100
16 Sacramento, CA 95814
Telephone: (916) 554-2740
17 Fax: (916) 554-2740
Email: [S](#)

18 Attorneys for Plaintiff United States of America

19 EDMUND G. BROWN JR.
20 Attorney General of the State of California
MATTHEW J. RODRIGUEZ
21 Chief Assistant Attorney General
KEN ALEX
22 Senior Assistant Attorney General
SALLY MAGNANI KNOX
23 Supervising Deputy Attorney General

24 /s/Kirk McKinnis
25 KIRK MCINNIS, State Bar No. 130952
Deputy Attorney General
26 1515 Clay Street, 20th Floor
P.O. Box 70550
27 Oakland, CA 94612-0550
Telephone: (510) 622-2191
28 Fax: (510) 622-2191
Email: [K](#)